No. 94-210

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

ISRAEL S. WEISSBRODT,
Petitioner,
v.
THE WHITE MOUNTAIN APACHE TRIBE OF ARIZONA and THE UNITED STATES,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

REPLY BRIEF FOR THE PETITIONER

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IN THE

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REPLY BRIEF FOR THE PETITIONER

Respondent does not take issue with the merits of our Petition.[1] Respondent does not rebut our demonstration that the question we have tendered is an issue of broad importance, applicable to a wide variety of cases in which the federal courts are called upon to evaluate the "results obtained" by counsel in ruling on fee applications. Pet. 12-17. Respondent does not dispute in any way our showing that what we say the holding below is—that a settlement offer once rejected is not a valuable "result obtained"—conflicts with the holdings of a variety of federal and state courts. Pet. 17; Br. in Opp. 16. Respondent does not take issue with the accuracy of our quotation of many decisions of the courts below in this case

[1] The United States is technically a respondent, *see* S. Ct. R. 12.4, but it did not participate in the proceedings below and has waived its right to submit a Response to the Petition. Therefore, we shall use the term "Respondent" to refer solely to the White Mountain Apache Tribe of Arizona.

critical of the voracious and wasteful consumption of judicial resources following the rejection of the settlement. Pet. 6-8.[2] And Respondent does not dispute the importance of fair rules that promote the settlement of civil litigation, or that the rule advocated by the Petition would be such a rule. Pet. 12, 18.

Instead, Respondent takes issue with our characterization of this case as an ideal one in which to establish and announce these rules, principally by arguing (a) that the trial court did not adopt a *per se* rule that a rejected settlement is not to be considered as a "result accomplished" and (b) that in any event the facts of the case are not as bad as they seem. Respondent is wrong on each score.

1. *The Lower Court Announced a Per Se Rule.*—Respondent is in agreement with us that the touchstone of what the Court of Federal Claims decided, and what the Court of Appeals affirmed, is to be found in the passage from the lower court's opinion which appears as the first paragraph on page 13a of our Appendix. In an effort to claim that the court did not enunciate a *per se* rule,[3] the Respondent quotes from that paragraph twice (Br. in Opp. 4, 12).

The thesis of that paragraph is as follows:

> A rejected settlement, no matter how attractive it appears with hindsight, cannot reasonably be termed a "result accomplished" that justifies a 10-percent fee from an award obtained through totally separate litigation. The result obtained by the associated attorneys for the Tribe was essentially nil. The true "result accomplished and the benefit[] flowing to the client[]" was the final award. The associated attor-

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[2] Respondent does misquote our Petition, however, claiming that we said all of that wasteful litigation would have been *"permitted"* by a settlement. Br. in Opp. 15 (emphasis by Respondent). We said that the wasteful litigation would have been *"pretermitted."* Pet. 19. There is a difference.

[3] The Respondent thus calls our "question presented" a "falsified" question presented. *See, e.g.*, Br. in Opp. 11-13, 16, 20.

> neys [Weissbrodt] are entitled to compensation only to the extent that their efforts contributed to achieving this award. (Pet. App. 13a.)

Respondent says that this is not the expression of a *per se* rule but a "finding of fact." It seems to us obvious that it is the expression of a *per se* rule.

No more than a reading of the passage is really necessary to make this plain. But the rest of the court's opinion confirms it by applying the *per se* rule it enunciates: since the rejected settlement is not a "result accomplished," the court goes on a chimerical search to see the extent to which Weissbrodt's efforts, which ceased in 1982 on his termination, contributed to a judgment entered ten years later.

As the quoted material says, Petitioner and his associates were under the court's rule "entitled to compensation only to the extent that their efforts contributed to achieving" "the final award." The court repeated that the criterion was "the degree to which the associated attorneys' work assisted in obtaining the final judgment" (Pet. App. 18a), and held that it was inappropriate to base the attorney-fee award on the final award to the Tribe because the final award "does not reflect the work done by the associated attorneys." (Pet. App. 22a.)

2. *Respondent's Protests Notwithstanding, the Facts Are As Bad As They Seem.*—Respondent then spends much effort attempting to prove that this was *not* a case of a client lured into litigation to the bitter end and winding up with a worse outcome than the settlement offer it rejected. Standing in the way of this attempt is the remarkable prescience displayed by Weissbrodt, who told the Tribe it would take ten years to achieve a like amount to the $13 million settlement offer, Pet. 4, and the claims of tens and ultimately hundreds of millions of additional dollars that replacement counsel said he could obtain but failed to deliver. To get around these hard facts, Respondent returns to two of the three concerns raised in connection with the Tribe's 1982 rejection of the $13 million settlement. *See* Pet. 4-6.

First, it insists that the concerns about the settlement's effect on its future water rights were not only well-founded but also borne out, because, it says, the Federal Court of Claims actually granted it some kind of declaratory relief in connection with future water rights that would have been lost through the proposed settlement. Br. in Opp. 8-9. That is simply false.

Leaving aside the recommendation of the Government's trial counsel that the final text of the settlement agreement contain an express disclaimer of any effect on the Tribe's water rights (Pet. 4)—a fact that Respondent does not and cannot deny [4]—review of a few elementary principles is sufficient to dispose of the notion that this litigation (let alone a settlement of it) could have had any effect on any of the Tribe's water rights. The jurisdiction of all four tribunals that adjudicated this matter at the trial level—the Indian Claims Commission, the Court of Claims, the Claims Court, and the Court of Federal Claims—was limited to the award of money damages.[5]

A passage by the trial court alluded to and quoted out of context by Respondent (Br. in Opp. 8-9) confirms this to be the case. The court "found and concluded that

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[4] Contrary to what Respondent says, the proposal at the time of the settlement was not simply to proceed on the basis of an informal interpretation by the Government's trial counsel (Br. in Opp. 2-3), but to pursue trial counsel's recommendation that an express disclaimer of any effect on the water rights issue be included in the settlement agreement.

[5] *Osage Nation of Indians* v. *United States,* 1 Ind. Cl. Comm. 54, 65-66 (1948), *rev'd on other grounds,* 119 Ct. Cl. 592, 97 F. Supp. 381, *cert. denied,* 342 U.S. 896 (1951); *Kingsbury* v. *United States,* 215 Ct. Cl. 136, 563 F.2d 1019, 1023-24 (1977) ("This court does not have jurisdiction of a claim *in rem* or of claims generally for specific relief. *United States* v. *Jones,* 131 U.S. 1 (1889). Congress has consented to suits *in rem* against the United States only in courts other than this one. . . . 43 U.S.C. § 666 (water rights)"). Decisions of the Court of Claims are binding on the Federal Circuit, and thus on the Court of Federal Claims and its predecessor, the Claims Court. *South Corp.* v. *United States,* 690 F.2d 1368, 1370 (Fed. Cir. 1982) (in banc).

plaintiff proved no damages" or liability for any claim of governmental diversion or mismanagement of water rights. 11 Cl. Ct. 614, 647. As for the assertion that the court was actually providing some kind of declaratory relief about the priority of the Tribe's water rights (Br. in Opp. 8-9), the court expressly cautioned that "this is not a *Winters* Doctrine rights case insofar as the Claims Court lacks jurisdiction to adjudicate claims over plaintiff's reserved water rights in terms of the right to future use. That question is being litigated in Arizona state court." 11 Cl. Ct. at 626-27.

Thus, the proper forum for the adjudication of Respondent's future water rights was not, and could never have been, any of the tribunals to which this case has been assigned over the decades. They had no jurisdiction; and apart from that, as forums for claims against the United States, they could not adjudicate the relative rights of the many private parties who might assert conflicting water rights claims, as in a state court proceeding. *See, e.g., Martin* v. *Wilks*, 490 U.S. 755, 763 (1989). Respondent knows this. The Ninth Circuit's decision in *White Mountain Apache Tribe* v. *Hodel*, 784 F.2d 921 (9th Cir.), *cert. denied*, 479 U.S. 1006 (1986), was one in a long series of Respondent's efforts under its present counsel to thwart the adjudication of those claims in the proper forum. The Court had this to say:

> As it has on numerous occasions in the past, the Tribe here again sought a ruling that Arizona courts had no jurisdiction to adjudicate the Tribe's water rights . . . . The Tribe persists in misconstruing the McCarran Amendment and the decisions applying it. We find it difficult to respond to the Tribe's contentions at this late date other than to state flatly that the Tribe is wrong. The state court *does* have the authority to adjudicate tribal water rights. The Congress has said so, *see* McCarran Amendment, 43 U.S.C. § 666; the United States Supreme Court has said so, *see Arizona* v. *San Carlos Apache Tribe*, 463 U.S. 545 (1983); *Colorado Water Conservation Dist.* v. *United States*, 424 U.S. 800 (1976); the

> Arizona Supreme Court has said so, *see United States* v. *Superior Court in and for Maricopa County*, 144 Ariz. 265, 697 P.2d 658 (1985); and we have said so, *see Northern Cheyenne Tribe* v. *Adsit*, 721 F.2d 1187 (9th Cir. 1983). It is time that the Tribe accept the proposition as true.

Id., 784 F.2d at 924 (emphasis by the court). The Ninth Circuit therefore concluded that insofar as any charges of mismanagement "affect the amount of water to which the Tribe is entitled, they must be presented to the Superior Court of Maricopa County." *Id.*

Thus, the Arizona state courts—and not any of the tribunals in this case—were vested with jurisdiction over the Tribe's water-rights claims. No declaratory judgment could have been or was made on such claims by the Court of Federal Claims. 11 Cl. Ct. at 626. And the proposed settlement did not affect them; it is black letter law that a judgment cannot operate as *res judicata* on a claim as to which the court had no subject matter jurisdiction.[6] While theoretically a release clause in the settlement agreement could have, if it expressly purported to, release claims beyond the scope of the court's subject matter jurisdiction, the fact of the matter is that the release clauses in the proposed settlement agreement here only covered claims which the Tribe "have asserted or could have asserted" in the docket "under the Indian Claims Commission Act." *See* Court of Appeals Appen-

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[6] "When special jurisdictional limitations prevent assertion of all matters arising out of a single transaction in one action, a second action is not precluded." 18 Charles A. Wright, *et al.*, *Federal Practice & Procedure* § 4412 at 94 (1981); *see Lower Sioux Indian Community* v. *United States*, 224 Ct. Cl. 458, 626 F.2d 828, 831-32 (Ct. Cl. 1980) (judgments not preclusive where they were issued under statutes granting specific limited jurisdiction to the Court of Claims to adjudicate only certain claims: the "claims plaintiffs now wish to present were not part of any claim of which this Court had jurisdiction" under the special acts); *cf. Golden Pacific Bancorp* v. *United States*, 15 F.3d 1066, 1071 (Fed. Cir. 1994) (takings claim in Court of Federal Claims not barred by district court action where Tucker Act precluded claims litigation in the district court), *cert. filed*, 63 U.S.L.W. 3066 (July 18, 1994).

dix at 79-81; Pet. 5 n.7. Thus, the arguments that the settlement was properly rejected because of a concern about water rights—or that water rights were somehow secured by the subsequent decade of litigation—or that the $13 million settlement and the judgment obtained a decade later cannot be compared because the $13 million settlement would have sacrified the water rights—are all without merit.[7]

Second, Respondent asserts that the actual amount it recovered was somehow better than the rejected settlement (Br. in Opp. 7-8, 14, 17). This, too, is without substance. Respondent does not and cannot dispute that replacement counsel gave the Tribe visions of tens and ultimately *hundreds* of millions of dollars that were not delivered. The truth is that, because of purchasing-power differences, the $13 million settlement would have been superior from a financial, as well as a resource-allocation, point of view. We pointed out that the judgment Respondent obtained after ten years of litigation—for about $14.4 million, which with interest totalled some $19 million [8] in November 1993, when the trial court denied the fee application at issue here—was worth less in constant dollars than the $13 million settlement. Pet. 9 & n.14. Like the Court of Federal Claims,[9] Respondent seems to

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[7] Respondent's other argument that it obtained something more than money involves a repeatedly rejected theory about the Reservation's boundary. Br. in Opp. 10, 14. Whatever the merit of the claim (it was again rejected in the decade of subsequent litigation as it has been by several other courts), the lower courts' jurisdiction here was limited to an award of money damages. *See supra* pp. 4-5.

[8] The Respondent claims that the Petition compared the rejected $13 million settlement of 1982 with the $14.4 million judgment of 1992 without interest. (Br. in Opp. 7.) But our comparison of the real value of the two settlements uses the $19 million figure, including the interest, for what the additional decade of litigation got *in toto*. *See* Pet. 9 & n.14 (the current value of the rejected settlement at the time of the hearing on the fee application was $21.8 million).

[9] *See* Pet. App. 20a ("the comparison [of $13 million adjusted for the time-value of money with the $14.4 million adjusted for

think it appropriate to treat the $13 million rejected settlement as though it would have been handed over in a sheaf of currency to be stuffed into a mattress or locked away in a drawer for ten years, rather than to be used.

In the end, Respondent is left only with the third concern that drove rejection of the settlement—a desire to "know[] what its claims were worth" by litigating to the bitter end. *See* Pet. 6; Br. in Opp. 9-10. To be sure, a lawyer's client has, and must have, the right to choose such a course of action; we do not suggest otherwise. We merely suggest that exercise of that right should be conditioned on facing obligations under rules designed to promote fairness, judicial efficiency, and just resolution of civil litigation. *See* Pet. 16-17, 18.

3. *Respondent's Procedural Arguments Are No Bar to Review.*—Respondent makes two procedural arguments. *First*, it actually asserts that this Court is *bound* by the lower courts' decisions in this case under the doctrine of "res judicata." Brief in Opp. 2, 5, 17, 23-26. A lower court decision has no *res judicata* effect on direct appeal. Apparently Respondent's argument is an effort to invoke the rule that factual findings of a trial court will not be disturbed on appeal unless clearly erroneous. Of course, that rule has no application to questions of law, like the one presented here: whether a settlement offer rejected by a client is of no value in considering the "results obtained" in connection with a fee application. And, as demonstrated above (pp. 2-3) that issue was decided as a question of law. *See* Pet. App. 13a. As Professor Moore has explained, "Findings of fact that are induced by an erroneous view of the law are not binding. Nor are findings that combine both fact and law, if there is

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the time-value of money] is invalid since it assumes that the Tribe would have banked all the proceeds"). Once again, our methodology in comparing the settlement and the final judgment (the latter with interest, the former without) does not assume that the $13 million settlement would have been invested at interest; it assumes rather that it would have been immediately spent. It still would have bought more goods and services than the final judgment, with its interest, would have bought.

error as to the law." 5A J. William Moore, *et al.*, *Moore's Federal Practice* ¶ 52.03[3] at pp. 52-79 to 52-81 (2d ed. 1994). Thus, this Court has vacated and remanded a fee award for redetermination by the trial court where the lower court "did not properly consider the relationship between the extent of success and the amount of the fee award." *Hensley* v. *Eckerhart*, 461 U.S. 424, 438 (1983).

In this regard, Respondent's insistence (Br. in Opp. 5-7) that the trial court's decision rested on whether Weissbrodt met his "burden of proof" is misguided. To be sure, the authority to determine the proper fee in this case is vested in the trial court (as is the case with all court-supervised fee awards). But whether the trial court applied the proper standard in doing so is a question of law. And the only question of law presented in the Petition is whether the lower courts were correct in enunciating a rule that assigned a value of "essentially nil" to a rejected settlement proposal; we expressly disclaimed reliance in seeking certiorari on the trial court's other apparent errors (Pet. 11 n.18). These other errors were committed in the course of the court's exploration of the factual inquiry that necessarily resulted from the court's core error, that Weissbrodt and his associates were "entitled to compensation only to the extent that their efforts contributed to achieving this award," that is, "the final award," obtained after the successor counsel's decade of litigation, in 1992. *See* pp. 2-3, *supra*; Pet. App. 13a. The "burden of proof" that was thus imposed on Weissbrodt as a result of the court's error is what the Respondent speaks of in contending that Weissbrodt did not meet his "burden of proof" (Br. in Opp. 5-7). What Weissbrodt unquestionably produced was the $13 million settlement, rejected by the Tribe in 1982.

Second, in an apparent flight of fancy, Respondent contends that the question presented in the Petition was not raised in the lower courts. Br. in Opp. 5, 11. But Petitioner's entitlement to an award of 10% of the rejected settlement has been the central question throughout

the proceedings. Point II of Weissbrodt's brief in the Court of Appeals was that "The lower court erred in treating the value of the proposed settlement as nil because the Tribe elected to reject it." Brief of Appellant 20. The passage begins, "The Court of Federal Claims . . . refused to accord any value at all to the negotiated settlement. . . . The court was wrong, as a matter of logic and policy," *id.* at 20-21, and goes on for five pages. The additional point, that the settlement offer was a valuable "result achieved," consumes pages 30 to 34. The issue also received attention at the Court of Federal Claims level; indeed, as noted above (p. 2), Respondent quotes from that court's *holding* on this point of law not once but twice. Br. in Opp. 4, 12. Any contention that it was not *the central* issue below—not simply *an* issue raised below—is frivolous. The issue was raised below; the central ruling below is clearly one of law; and that ruling is not defended on its merits, nor is the importance of the question denied.

CONCLUSION

For the foregoing reasons, and the reasons stated in our Petition, the Petition for a writ of certiorari should be granted.

Respectfully submitted,

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